

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-97-0017
	)	
Limeco, Inc.,	)	
	)	
Respondent	)	<b>Decision and Order</b>

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-151) [hereinafter the Rules of Practice], by filing a Complaint on March 17, 1997.

The Complaint alleges that: (1) Limeco, Inc. [hereinafter Respondent], misrepresented the origin of 411 cartons of limes that it packed and sold to three customers in the course of interstate and foreign commerce and made false and misleading statements in connection with the misbranded limes (Compl. ¶¶ III, IV); and (2) at least during the period January 1996 through September 1996, Respondent failed to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business by failing to provide a positive means of identification to segregate the various lots of limes being handled by Respondent

(Compl. ¶ V). Respondent filed Answer and Affirmative Defenses [hereinafter Answer] on April 24, 1997, denying the material allegations of the Complaint.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on December 16 and 17, 1997, in Miami, Florida. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Al Slobusky, Respondent's financial officer, represented Respondent.\*

On February 3, 1998, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law, and on February 23, 1998, Respondent filed Post Hearing Brief of Limeco. On March 25, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent willfully, flagrantly, and repeatedly violated section 2(5) of the PACA (7 U.S.C. § 499b(5)) by misrepresenting the country of origin of 411 cartons of limes that Respondent sold to three customers; (2) concluded that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making false statements regarding the country of origin of 411 cartons of limes that Respondent sold to three customers; (3) concluded that Respondent willfully, flagrantly, and repeatedly violated section 9 of the PACA (7 U.S.C. § 499i) by maintaining documents which

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\*Susan H. Aprill, Esq., Holland & Knight, LLP, Miami, Florida, entered an appearance on behalf of Respondent on April 9, 1997, but filed Holland & Knight LLP's Motion to Withdraw on November 12, 1997, which was granted on November 17, 1997 (Order Granting Motion to Withdraw, filed November 17, 1997). J. Randolph Liebler, Esq., Liebler, Gonzales & Portuondo, P.A., Miami, Florida, filed Respondent's Answer Brief and Respondents [sic] Cross Appeal Petition, on behalf of Respondent on May 18, 1998, and June 5, 1998, respectively.

incorrectly disclosed the country of origin of 411 cartons of limes that Respondent sold to three customers; and (4) suspended Respondent's PACA license for 15 days (Initial Decision and Order at 6-7, 17).

On April 23, 1998, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>\*\*</sup> On May 18, 1998, Respondent filed Respondent's Answer Brief.

On June 5, 1998, Respondent filed Respondents [sic] Cross Appeal Petition, and on June 25, 1998, Complainant filed Complainant's Response to Respondent's Cross Appeal Petition. Respondents [sic] Cross Appeal Petition was not timely filed; and therefore, I have not considered Respondents [sic] Cross Appeal Petition or Complainant's Response to Respondent's Cross Appeal Petition.<sup>\*\*\*</sup> Moreover, neither Respondents [sic] Cross Appeal Petition nor Complainant's Response to Respondent's Cross Appeal Petition is part of the record of the proceeding.

On July 21, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

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<sup>\*\*</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

<sup>\*\*\*</sup>On April 23, 1998, Respondent requested an extension of time to June 3, 1998, for filing Respondent's appeal petition, which I granted (Informal Order, filed April 23, 1998). Therefore, Respondents [sic] Cross Appeal Petition, filed June 5, 1998, was not timely filed.

Based upon a careful consideration of the record in this proceeding, except with respect to the sanction imposed against Respondent by the Chief ALJ, the Initial Decision and Order is adopted as the final Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

Complainant's exhibits are designated by the letters "CX," Respondent's exhibits are designated by the letters "RX," and transcript references are designated by "Tr."

#### **PERTINENT STATUTORY PROVISIONS**

7 U.S.C.:

#### **TITLE 7—AGRICULTURE**

.....

#### **CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES**

.....

#### **§ 499b. Unfair conduct**

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

.....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such

transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated—

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed \$2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

**§ 499i. Accounts, records, and memoranda; duty of licensees to keep; contents; suspension of license for violation of duty**

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

**CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER  
(AS MODIFIED)**

**Preliminary Statement**

. . . .

. . . All proposed findings, conclusions, and arguments have been considered. To the extent indicated, they have been adopted, otherwise they have been rejected as irrelevant or not supported by the record.

. . . .

**Findings of Fact**

1. Respondent, Limeco, Inc., is a corporation organized and existing under the laws of the State of Florida. Respondent's business address is 25251 S.W. 139th Avenue, Princeton, Florida 33092. Respondent's mailing address is P.O. Box 4061, Princeton, Florida 33092. Respondent is, and at all times material to the Complaint was, licensed under the PACA. ([Answer ¶ II;] CX 1.)

2. Respondent is an importer, grower's agent, grower, and packer specializing in limes and avocados (Tr. 18, 273). Respondent's principals are Herbert Yamamura, its president, a director, and 100 percent stockholder; Robert Yamamura, its vice-president and a director; and April Yamamura, its secretary-treasurer and a director (CX 1 at 1).

3. Respondent handles Persian seedless limes which are grown in both Florida and Mexico. A Persian seedless lime [grown in] Mexico that has just been picked . . . looks and tastes the same as a Persian seedless lime [grown in] Florida. (Tr. 338-39.)

4. Hurricane Andrew, which struck southern Florida on August 24, 1992, had a disastrous effect on the Florida lime growers (Tr. 334). The hurricane destroyed 90 percent of the 6,800 [acres of] lime trees then growing in the State of Florida . . . and less than 2,600 acres [of lime trees] have since been replanted (Tr. [334-]35). Lime trees do not immediately start producing fruit after they have been replanted (Tr. 335). Florida lime growers shipped 1.8 million bushels [of limes] annually prior to the hurricane, but[, at the time of the hearing, expected] to ship only 500,000 bushels [of limes in 1997] (Tr. 335-36). Currently, Respondent's best trees are 5 years old and produce 350 bushels [of limes] an acre . . . , which is less than the 500 bushels [of limes] an acre that must be produced before a lime grower can earn a profit (Tr. 335).

5. Because the amount of Florida limes produced and shipped after the hurricane was drastically reduced, Florida lime sellers, such as Respondent, who wished to provide limes to their buyers, were required to obtain the limes from foreign countries (Tr. 337). By 1996, the time of the transactions set forth in the Complaint, approximately 60 percent of the limes provided to buyers were grown in Florida and approximately 40 percent [of the limes provided to buyers were grown in] Mexico (Tr. 338).

6. On the days when Respondent is packing or shipping fruit, it arranges for a USDA [or state] inspector to be present (Tr. 354-55). The inspector provides a stamp, which is placed on [cartons] of Florida limes to certify their origin (Tr. 291). Inspectors are not present at [Respondent's premises at] all times, as Respondent does not pack or ship fruit every day (Tr. 355-56).

7. Respondent receives Florida limes in bulk and stores them in bins. When Respondent packs . . . Florida limes, it removes them from the bins and packs them into cartons. (Tr. 291.) This process is observed by the inspector; however, if Respondent's bins contained Mexican limes that were placed there at a time when the inspector was not present, the inspector would have no reason to know that the limes being packed were anything but Florida limes (Tr. 357-58).

#### **Findings Related to the Mango Plus Transaction**

8. On or about August 12, 1996, Respondent received 1,056 cartons of Mexican limes from San Gabriel (CX 4 at 1, 18, 24, 25). On or about August 13, 1996, Respondent received 550 cartons of Mexican limes from London Fruit, Inc., through R&S Distributors, Inc. (CX 4 at 1, 17, 28, 29). These limes were all assigned the Mexican lot number 633 (CX 4 at 1). Of the 1,606 cartons of Mexican limes that Respondent received, 89 of the cartons purchased from London Fruit, Inc., were dumped, and the remaining 1,517 cartons were sold (CX 4 at 1, 17, 21).

9. On August 15, 1996, Respondent received an order from Mango Plus, through its broker, R&S Distributors, Inc., for 400 forty-pound cartons ("bruce cartons") of Florida limes under Respondent's "Qual-A-Key" label (CX 4 at 4).

10. On August 15, 1996, Respondent issued a manifest for shipment of 400 cartons of Qual-A-Key brand Florida limes to Mango Plus (CX 4 at 5). The limes were shipped the same day and were received by Mango Plus, in New York, New York, on August 18, 1996 (CX 5 at 1). The limes were inspected in New York on August 20,



1996. The inspection certificate shows that the limes were represented to be Florida produce (CX 5 at 3).

11. On August 16, 1996, Respondent issued an invoice to R&S Distributors, Inc., for 400 [cartons] of Qual-A-Key limes sold to Mango Plus. The [item number used on the invoice to describe 250 cartons of the limes indicates that the limes were from] lot number 633. [Lot number 633 consisted of Mexican limes.] (CX 4 at 2.)

12. Respondent's grower sales report for lot number 633 confirms that the 250 [cartons of limes sold through R&S Distributors, Inc., to Mango Plus, were] Mexican limes (CX 4 at 1).

13. The limes sold for \$1.65 per [carton] (CX 4 at 2).

#### **Findings Related to the PBA Marketing Transaction**

14. On September 9, 1996, Respondent received an order from PBA Marketing, for 150 ten-pound cartons ("pony cartons") and three bruce cartons of Qual-A-Key brand Florida limes (RX 3).

15. On September 11, 1996, Respondent issued a manifest for shipment of 153 cartons of Qual-A-Key brand Florida limes to PBA Marketing in Lakemary, Florida [(CX 7 at 3)].

16. [O]n September 12, 1996, Respondent issued an invoice, billing PBA [Marketing] for 153 cartons of Qual-A-Key limes. The item number used on the invoice to describe the pony cartons [of limes] indicates that the limes were from lot number 637. (CX 7 at 2.) Lot number 637 consisted of Mexican limes (CX 7 at 1, 4, 5, 7, 12).

17. Respondent's grower sales report for lot 637 [confirms] that the 150 pony cartons sold to PBA [Marketing] were Mexican limes [(CX 7 at 2)].

18. Fifty of the pony cartons [of limes were] sold [to PBA Marketing] for \$3.35 each, and the other 100 [pony cartons of limes were] sold [to PBA Marketing] for \$2.85 each (CX 7 at 2).

**Findings related to Carnival Fruit [Transaction]**

19. On September 14, 1996, Carnival Fruit ordered 40 pony cartons and 11 bruce cartons of Qual-A-Key brand Florida limes from Respondent (CX [10] at [5]).

20. On September 16, 1996, Respondent issued a manifest for shipment of 51 cartons of Florida limes to Carnival Fruit in Miami, Florida [(CX 10 at 4)].

21. On September 16, 1996, Respondent issued an invoice to Carnival Fruit for the 51 cartons of Qual-A-Key limes [(CX 10 at 2)].

22. The item . . . number used on the invoice to describe the 11 bruce cartons [of limes] indicates that the limes were from lot number 637 (CX 10 at 2). Lot number 637 consisted of Mexican limes (CX 10 at 1, 7, 10, 15).

23. Respondent's grower sales report for lot number 637 confirms [that] the . . . 11 cartons [of limes sold] to Carnival Fruit [were Mexican limes (CX 10 at 1)].

24. [One of the] 11 cartons [of limes] sold for \$22, [5 of the 11 cartons of limes sold for] \$13, and [5 of the 11 cartons of limes sold for] \$11 (CX 10 at 2).

**Conclusions of Law**

1. Respondent willfully, flagrantly, and repeatedly violated section 2(5) of the PACA [(7 U.S.C. § 499b(5))] by misrepresenting the . . . origin of 411 [cartons] of limes

that it sold to three customers. Specifically, the limes, which originated in Mexico and which were received, sold, or shipped in interstate or foreign commerce, were identified by Respondent as Florida grown.

2. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA [(7 U.S.C. § 499b(4))] by making false statements regarding the country of origin of 411 [cartons] of limes that it sold to three customers. Specifically, the limes, which originated in Mexico and which were received, sold, or shipped in interstate or foreign commerce, were identified by Respondent as Florida grown.

3. Respondent willfully, flagrantly, and repeatedly violated section 9 of the PACA [(7 U.S.C. § 499i)] by maintaining documents which incorrectly disclosed the country of origin of 411 [cartons] of limes that it sold to three customers. Specifically, the limes, which originated in Mexico and which were received, sold, or shipped in interstate or foreign commerce, were identified by Respondent as Florida grown.

### **Discussion**

Complainant alleges that Respondent violated: (1) section 2(5) of the PACA [(7 U.S.C. § 499b(5))] by misrepresenting the country of origin when it shipped 411 [cartons] of limes to [three of Respondent's] customers [(Compl. ¶ III)]; (2) section 2(4) of the PACA [(7 U.S.C. § 499b(4))] by making false and misleading statements, for a fraudulent purpose, by issuing documentation which incorrectly listed the origin of the limes [(Compl. ¶ IV)]; and (3) section 9 of the PACA [(7 U.S.C. § 499i)] by maintaining records that incorrectly identified, or failed to accurately disclose, all the details of the transactions, with respect to the limes [(Compl. ¶ IV)].

Section 2(5) [of the PACA]

....

Complainant alleges that Respondent violated section 2(5) [of the PACA (7 U.S.C. § 499b(5))] by representing that the . . . 411 [cartons] of limes [originated in] Florida, when, in fact, Respondent's grower sales [reports] and inventory show the [limes originated in] Mexico [(CX 4 at 1, 31, 35, CX 7 at 2, 4, 5, 7, 8, CX 10 at 1, 7, 10)]. Respondent admits that all of its internal records identify the limes as Mexican grown [(Tr. 295-304). Respondent] also admits that the limes were shipped to fill orders for Florida limes, that the limes were shipped in [cartons] that identified the contents as Florida limes, and that it issued manifests that identified the fruit as Florida limes. Respondent claims, however, that there was no misrepresentation because the limes were, in fact, grown in Florida. [(Tr. 286-87.)]

Respondent claims that in each of the transactions, an order was taken for Florida limes and Florida limes were shipped [(Tr. 288-89)]. It was after shipment, that the Mexican lot numbers were supposedly assigned [to the Florida limes]. Herbert Yamamura, Respondent's owner, explained that he knew the limes that were shipped were not going to bring a good price because he had held them . . . too long; [therefore,] instead of letting the Florida growers take the loss, he assigned the limes to the Mexican pool and planned to assign Mexican limes, for which he expected a better price, to the Florida pool in exchange [(Tr. 295-304)].

Respondent's explanation is unconvincing for several reasons. First, Respondent is unable to account for the disposition of the Mexican limes, if they were not sold in the

three transactions at issue. Respondent's grower sales report indicates that lot 633 consisted of 1,606 [cartons] of Mexican limes, 1,056 of which were purchased from San Gabriel and 550 of which were purchased from London Fruit[, Inc.,] through R&S [Distributors, Inc.] (CX 4 at 1). Other documents corroborate the number of [cartons of] Mexican limes listed on [Respondent's grower] sales report. Two inspection certificates, each dated August 8, 1996, indicate that San Gabriel shipped Respondent 1,056 [cartons] of Mexican limes (CX 4 at 2[4], 25); and a bill of lading from London Fruit[, Inc.,] and a memorandum from R&S Distributors[, Inc.,] both indicate that they sold Respondent 550 [cartons] of Mexican limes (CX [4 at] 28, 29).

[Respondent's grower] sales report indicates that of the 1,606 [cartons] of Mexican limes in lot 633, 250 [cartons] were sold to Mango Plus [(CX 4 at 1)]. Mr. Yamamura testified that those limes were not sold to Mango Plus; however, he could not say where the limes actually went or what price he received for them (Tr. 340-43); and Respondent presented no documentation to verify the sale of the limes to other customers. It is implausible that Respondent would not document the disposition of all 1,606 cartons of the Mexican limes that it received.

Likewise [Respondent's] grower sales report for Mexican lot number 637 indicates that Respondent sold 11 [cartons of Mexican limes] to Carnival [Fruit] on September 17, 1996, and 150 [pony] cartons [of Mexican limes] to PBA [Marketing] on September 12, 1996 (CX 7 at 1).<sup>1</sup> While there is documentation of the sales to Carnival [Fruit] and

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<sup>1</sup>[Respondent's grower] sales report also shows that PBA [Marketing] purchased 18 [cartons] from lot 637 on September 17, 1996 [(CX 7 at 1)]; however, [Respondent] is not alleged to have misrepresented the origin of the limes in these 18 [cartons].

PBA [Marketing] indicating Florida grown limes (CX 7 at 2-3, [CX] 10 at 2-5), Respondent presented nothing to show the disposition of the Mexican limes with which they were supposedly switched on the [grower] sales report. Although the record does not contain [documents] which trace the origin of lot number 637, as it does with [lot number] 633, Respondent claims that there was a switch of lot numbers, not that the Florida limes were simply added to the Mexican pool. Accordingly, Respondent still should be able to account for the limes that were supposedly switched out of the Mexican pool and into the Florida pool.

Furthermore, Respondent's assertion that it pooled the Florida sales with Mexican lots because it knew the Florida limes would not receive a good price is belied by the fact that [of the 11 cartons of limes that Respondent sold to Carnival Fruit, one carton sold for \$22, 5 cartons sold for \$13, and 5 cartons sold for \$11 (CX 10 at 2[; Tr. 295-304))]. When questioned about those sales, Mr. Yamamura admitted that those were good prices and stated that . . . the limes [sold to Carnival Fruit] were pooled with the Mexican lot by mistake (Tr. 3[53-54]). In addition, on the sale to PBA Marketing, [Respondent] received \$3.35 [per carton for 50 pony cartons] and \$2.85 [per carton for 100 pony cartons]. . . . Although there was no testimony as to whether or not those were good prices, they appear to be reasonable in light of the fact that they are consistent with prices received for the other pony [cartons] in lot 637 (CX 7 at 1).

Respondent also contends that it could not have sold Mexican limes in Florida [cartons] because the Mexican limes are imported in cartons, while Florida limes are imported in bulk and packaged under the observation of a USDA [or state] inspector,

who stamps the [cartons] certifying that they contain Florida fruit ([RX 2;] Tr. [278-80,] 290-9[5, 356-57])). However, an inspector is not at [Respondent's] plant every day, only at times that fruit is being packed and shipped (Tr. 35[4-57]). Respondent, therefore, could have dumped the Mexican limes into the bins with the Florida limes at a time when an inspector was not present. When the limes were packaged, there would be no way for the inspector to know the bins contained anything other than Florida limes. Respondent claims that an inspector [can distinguish Florida limes from Mexican limes] because Florida limes look "fresh and beautiful" (Tr. 295). This claim, however, is inconsistent with [Respondent's] argument that the Florida limes were added to the Mexican pool because the [Florida limes] were old, and worth less than the Mexican limes.

Respondent admits that it would be possible to combine the limes and package them all as Florida produce, but argues that such a scheme would be illogical because the cost of repackaging would diminish [Respondent's] profit. Respondent would not, however, have lost money on the transactions. Mr. Yamamura testified that there would be some profit after the cost of repacking, although not much. (Tr. 32[7-29].)

Respondent relies heavily on the argument that there could be no possible motivation for going to all the trouble of repackaging the limes for only "a few dollars" profit. It is quite possible, however, that Respondent was concerned about keeping its customers happy by filling orders for Florida limes at a time when such fruit was scarce.

[Respondent] may have acted out of fear of losing customers, or in the hope of gaining new ones by establishing a reputation for being able to meet demands for Florida limes.

Whatever Respondent's reasons, a preponderance of the evidence shows that Respondent sold 411 [cartons] of Mexican limes to [Mango Plus through] R&S Distributors, [Inc.,] PBA Marketing, and Carnival Fruit and that [Respondent] represented the [limes] to be Florida produce. These misrepresentations were made in violation of section 2(5) of the PACA [(7 U.S.C. § 499b(5))].

Section 2(4) [of the PACA]

....

Respondent made false statements in connection with the Carnival Fruit, PBA Marketing, and Mango Plus transactions by issuing manifests that falsely identify Mexican [limes] as Florida [limes] (CX 4 at 5, [CX] 7 at 3, [CX] 10 at 4). Respondent had a fraudulent intent, as the false manifests were meant to misrepresent the true origin of the [limes]. Respondent defrauded its customers by filling orders for Florida limes with Mexican limes falsely identified as Florida limes. As such, Respondent violated section 2(4) of the PACA [(7 U.S.C. § 499b(4))].

Section 9 [of the PACA]

....

Respondent's records failed to correctly disclose the nature of the transactions with Carnival [Fruit], PBA [Marketing], and R&S [Distributors, Inc.] Respondent maintained records, including manifests, which incorrectly identified Mexican limes as Florida limes (CX 4 at 5, [CX] 7 at 3, [CX] 10 at 4).

Respondent admitted that its records were incorrect, arguing only that it was the internal documents that were false, rather than the manifests [(Tr. 295-304)]. Even if



Respondent's argument were accepted, [Respondent's maintenance of internal records that do not fully and correctly disclose all transactions involved in Respondent's business] would be in violation of section 9 of the PACA [(7 U.S.C. § 499i)].

*Willful, Flagrant, and Repeated Violations*

Respondent argues that [this proceeding to suspend its license was] improperly initiated without first issuing a warning letter and offering Respondent an opportunity to achieve compliance with the [PACA], pursuant to 7 C.F.R. § 46.45(e)(5) and 5 U.S.C. § 558(c). A written warning is not required, however, in cases of willfulness.

Willfulness is defined, for purposes of the Administrative Procedure Act, as intentionally doing an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acting with careless disregard of statutory requirements. *See, e.g. Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, [502 U.S. 860] (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *In re George Steinberg and Son, Inc.*, 32 Agric. Dec. 236[, 263] (1973), *aff'd*, 491 F.2d 988 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974).

Some jurisdictions follow a stricter standard, considering an act willful only if it is done intentionally, or with gross neglect. *See, e.g., Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990).

Under either standard, however, Respondent's acts were willful, as they were intentionally done. Respondent mislabeled [limes] and issued false documentation with the intent to deceive [three of] its customers with respect to the actual origin of the limes. Since Respondent's violations were willful, it was not necessary for Complainant to issue a written warning or offer an opportunity to [achieve compliance with the PACA,] pursuant to 7 C.F.R. § 46.45(e)(5) [and 5 U.S.C. § 558(c)].

Respondent next contends that Complainant improperly initiated the action because the Regulations only permit formal proceedings for violations of section 2(5) [of the PACA (7 U.S.C. § 499b(5))] in cases in which such violations are flagrant or repeated. Respondent argues that the Regulations classify the type of misbranding in which Respondent engaged as a "very serious violation," as opposed to a "flagrant violation." The Regulations, however, also state that flagrant violations are not limited to the examples given. 7 C.F.R. § 46.45(a)[(3)]. In *Potato Sales Co. v. Department of Agric., supra*, 92 F.3d at 804, the court determined that misrepresentation of the origin of produce could constitute a flagrant violation despite its classification as very serious in the Regulations:

Examples given in PACA regulations suggest that a "flagrant" violation involves knowing conduct, whereas a "serious" or a "very serious" violation typically involves only accidental or negligent conduct. . . . Other indicia of "flagrant" rather than "serious" or "very serious" violations are a large number of transactions, committed over a period of time. . . .

Respondent's violations were knowing, not merely accidental or negligent; and although the amount of produce involved was significantly less than that in *Potato Sales*, which involved 7,5[54] cartons, Respondent's violations were more than an isolated

occurrence. The misbranding encompassed three transactions [involving 411 cartons of limes] over a month's time. As such, Respondent's violations were flagrant, and the initiation of a formal proceeding [in which the sanction recommended by Complainant is] . . . suspension [of Respondent's PACA license] was appropriate.

Furthermore, the Judicial Officer in *Potato Sales* found that even the simultaneous shipment of multiple [cartons] of misbranded produce would constitute repeated violations. *In re Potato Sales Co.* (Decision as to Potato Sales Co.), 54 Agric. Dec. 1382, 1404 (1995). Since Respondent's violations not only involved [411 cartons], but also consisted of three shipments, to three different customers, on three separate occasions, [Respondent's] violations were repeated.

### Sanctions

With respect to the appropriate sanction for violations of section 2(4) and (5) [of the PACA (7 U.S.C. § 499b(4), (5)), section 8 of] the PACA provides as follows:

#### **§ 499h. Grounds for suspension or revocation of license**

##### **(a) Authority of Secretary**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

##### **(e) Alternative civil penalties**

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a

commission merchant, dealer, or broker has violated section 499b of this title . . . , the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation.

7 U.S.C. § 499h[(a), (e) (1994 & Supp. II 1996)].

. . . Section 9 [of] the PACA provides that:

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business. . . . If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

7 U.S.C. § 499i.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Complainant recommends the suspension of Respondent's [PACA] license for a period of 45 days. Complainant does not favor the imposition of a civil penalty, as it does not want to compete with creditors for Respondent's funds; however, it recommends that if a civil penalty is imposed, it should amount to \$75,000.

. . . .

. . . Complainant's recommendation is entitled to a degree of deference. . . .

. . . .

Taking the [circumstances of this case] into consideration, I have concluded that a [4]5 day suspension [of Respondent's PACA license] is appropriate. . . .

. . . .

#### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Complainant contends in Complainant's Appeal Petition that the 15-day suspension of Respondent's PACA license imposed by the Chief ALJ is too lenient and urges the imposition of a 45-day suspension of Respondent's PACA license (Complainant's Appeal Pet. at 2).

I agree with Complainant's contention that a 15-day suspension of Respondent's PACA license is too lenient and that a 45-day license suspension is appropriate under the circumstances.

I agree with the Chief ALJ's conclusions that: (1) Respondent willfully, flagrantly, and repeatedly violated section 2(5) of the PACA (7 U.S.C. § 499b(5)) by misrepresenting the origin of 411 cartons of limes that it sold to three customers; (2) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making false statements regarding the origin of 411 cartons of limes that it sold to three customers; and (3) Respondent willfully, flagrantly, and repeatedly violated section 9 of the PACA (7 U.S.C. § 499i) by maintaining documents which were not correct in that they did not accurately identify the origin of 411 [cartons] of limes that Respondent sold to three customers (Initial Decision and Order at 6-7).

Moreover, I agree with the Chief ALJ's description of Respondent's violations as intentional, knowing, and designed to deceive its customers, as follows:

... Respondent's act were willful, as they were intentionally done. Respondent mislabeled fruit and issued false documentation with the intent to deceive its customers with respect to the actual origin of the limes. . . .

....

Respondent's violations were knowing, not merely accidental or negligent; and although the amount of produce involved was significantly less than that in *Potato Sales*, which involved 7,500 cartons, Respondent's violations were more than an isolated occurrence. The misbranding encompassed three transactions over a month's time. As such Respondent's violations were flagrant. . . .

Initial Decision and Order at 13-14.

Respondent's intentional mislabeling of 411 cartons of limes and falsification of records in an attempt to deceive three of its customers as to the origin of perishable agricultural commodities are the kinds of practices that the PACA is designed to prevent.

Further, as indicated by the Chief ALJ, the sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA must be given great weight (Initial Decision and Order at 16). However, Respondent contends that Complainant failed to adequately justify the recommended 45-day suspension of Respondent's PACA license (Respondent's Answer Brief at 4-6).

I disagree with Respondent. Mr. Bruce Summers, a regional director for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, testified regarding the basis for Complainant's recommendation, as follows:

[BY MR. STANTON:]

Q. What is Complainant's view as to the nature of the violations committed by the Respondent in regard to Section 9 of the PACA?

[BY MR. SUMMERS:]

A. That the Respondent violated Section 9 in that it maintained records that incorrectly identified the -- or failed to accurately disclose all the details of the transactions with respect to these limes.

Q. Now, moving back to the alleged 2(5) violations of the PACA. Why does the Complainant consider these violations to be willful and flagrantly repeated in this case?

A. Because we believe that the 2(5) violations, the violations involving the misrepresentation of the 411 boxes that were shipped, were done intentionally in order to misrepresent to their suppliers the origin.

Q. Why would these violations then be considered repeated?

A. They were repeated because there's more than one. 411, I believe, is the allegation in the complaint.

Q. And why would they be considered flagrant?

A. Because of the intentional nature of the violations, the number of boxes, and the period of time that the violations occurred.

Q. Now, with regard to the allegations of the violations of Section 2(4) of the PACA, why would Complainant consider these actions -- Respondent's actions -- to be willful and repeated and flagrant violations of 2(4)?

A. We believe that the Respondent issued the documentation which was -- which misrepresented the origin of limes to its customers for a fraudulent purpose, which was to trick or deceive the customers as to the origin of the limes.

Q. And why does Complainant consider Respondent's actions to be willful and repeated and flagrant violations of Section 9?

A. Again, because the -- many numerous documents in the Respondent's records mischaracterized it or didn't accurately disclose the origin of the limes.

Q. Now, Mr. Summers, what is the sanction which the Complainant recommends in this case?

A. The Complainant would recommend that the administrative law judge issue a 45-day suspension of Limeco, Inc.'s PACA license.

Q. Mr. Summers, what is the basis for this 45-day suspension recommendation?

A. Well, we examined the judicial officer's recent decision involving a company called Potato Sales, and we looked at the factors that he listed there, which generally were the intentional --

Potato Sales involved the misbranding of apples. And the judicial officer decided there were four key elements in that case that were -- the intentional nature of the violations, the large number of cartons in that case, the apparent scheme or organization that went into misbranding those apples, and the misrepresenting the origin of those apples, as well as the international issues that were present in this case. And when we compared this to case to that, there are some similarities.

The Complainant believes that these violations were also intentional, that they weren't the result of a dispute with the inspector as to the condition or quality of the limes before they were shipped.

There's also the international issue, in that this is produce coming in from outside of the United States -- Mexico, to be exact -- and the Complainant believes strongly that the Respondent's customers, and even the consumers down the line, to the extent that they cared whether or not they were buying foreign produce or Mexican limes, they have a right to rely on the information that's provided to them.

And so we compared those factors and found some similarities with Potato Sales and --

Of course, there's a larger difference here, between Potato Sales case -- where a revocation was handed out -- and this case -- where we're asking for a suspension. As in the number of cartons, there were 7500 cartons of apples in the Potato Sales case and here we're talking about 400, which is the reason for the lesser sanctions in this case.



Q. Now, as I stated in my opening statement, the Complainant's changed its sanction recommendation from the one that was alleged in the complaint, which was a 60-day license suspension. The Complainant has changed that to a 45-day license suspension. What is the reason for the change?

A. Since the filing of this complaint, there have been at least a few other misbranding cases or misrepresentation cases where complaints have been filed or settlements have been reached, and we believe that the 45-day suspension is more in line with those cases and is more appropriate than the 60-day suspension originally asked for.

Q. Now, Mr. Summers, are you aware of the case involving Western Sierra?

A. Yes, I am.

Q. In that case, do you know what the Department -- what the Complainant alleged in that case?

A. In general --

Q. Well, let me back up for a second. Do you know what kind of violations were alleged?

A. Yeah. They were very similar to the violations in this case. It had to do with misrepresentation as to -- high grade grapefruit (phonetic), for lack of a better word. And it had to do with the variety of grapefruit. But it was a similar sort of allegation, as to the misrepresentation to the Respondent in that case, Western Sierra's customers.

Q. What was the sanction that the Complainant recommended in that case? Do you know?

A. Yes, sir. A 90-day suspension of Western Sierra's PACA license.

Q. Do you know how many cartons were involved in that case?

A. I believe in the neighborhood of 2500 cartons.

Q. Now in this case, we have 411 cartons alleged to have been misbranded, correct?

A. Correct.

Q. That's about one-sixth the number of cartons in the Western Sierra case. Would you agree?

A. Yes, sir.

Q. Now, why wouldn't the Department then -- I'm sorry, the Complainant recommend a license suspension of one-sixth the number of days that it recommended in the Western Sierra case, which would have been --

One-sixth of 90 is 15.

A. Primarily because the one-sixth, or the 15 days, the Department feels is not a serious sanction -- certainly not serious enough for the violations which we have alleged occurred here. The Department only has -- can only issue a suspension up to 90 days, which is the maximum suspension. Beyond the 90-day suspension, the only alternative is a license revocation. So Western Sierra has been recommended for the most severe suspension possible.

In this case, we do not believe that a 15-day suspension, or one-sixth of what was offered to Western Sierra, would be sufficient. We think the 45 days is commensurate with the violations that have been alleged.

Q. In your experience, do you know whether the Department has ever alleged -- or has ever requested in a complaint or a hearing a suspension of less than 45 days?

A. Not that I'm aware of.

Tr. 202-07.

Respondent contends that the recommended sanction is severe in light of the lack of evidence of Respondent's motive for or benefit from its violations (Respondent's Answer Brief at 2-3). I agree with Respondent that the evidence does not establish Respondent's motive and the evidence indicates that the monetary benefit Respondent

received for its misrepresentations was not substantial. The Chief ALJ speculated as to Respondent's motive and benefit, as follows:

Respondent admits that it would be possible to combine the limes and package them all as Florida produce, but argues that such a scheme would be illogical because the cost of repackaging would diminish its profit. Respondent would not, however, have lost money on the transactions. Mr. Yamamura testified that there would be some profit after the cost of repacking, although not much. (Tr. 329). Respondent relies heavily on the argument that there could be no possible motivation for going to all the trouble of repackaging the limes for only "a few dollars" profit. It is quite possible, however, that Respondent was concerned about keeping its customers happy by filling orders for Florida limes at a time when such fruit was scarce. It may have acted out of fear of losing customers, or in the hope of gaining new ones by establishing a reputation for being able to meet demands for Florida limes.

Initial Decision and Order at 11.

While I agree with the Chief ALJ's speculation regarding Respondent's possible motive and adopt it in this Decision and Order, *supra*, the lack of evidence establishing Respondent's motive is not relevant either to a finding that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) or to the sanction to be imposed for Respondent's violations. Further, the fact that the evidence indicates that Respondent's monetary gain from its violations of the PACA was not substantial is not relevant either to a finding that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) or to the sanction to be imposed for Respondent's violations.<sup>2</sup> Whatever Respondent's reasons for its violations of the PACA, a

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<sup>2</sup>See *In re Potato Sales, Co.* (Decision and Order at to Potato Sales Co.), 54 Agric. Dec. 1382, 1400 (1995) (stating that the motive for respondent's misrepresentation of the origin of 7,554 cartons of apples is a matter of pure conjecture and the profits were not large, but motive is of no real moment), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

preponderance of the evidence shows that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) and that the violations were willful, flagrant, and repeated.

Respondent contends that the recommended penalty is severe when compared to the sanctions imposed in *In re Potato Sales Co.* (Decision and Order as to Potato Sales Co., Inc.), 54 Agric. Dec. 1382 (1995), *aff'd*, 92 F.3d 800 (9th Cir. 1996); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); and *In re E.J. Harrison & Son, Inc.*, 27 Agric. Dec. 1339 (1968) (Respondent's Answer Brief at 3-4).

I do not find that Complainant's recommended penalty is severe when compared to the sanctions imposed in the cases cited by Respondent. In *In re Potato Sales Co.*, *supra*, the judicial officer revoked Potato Sales Co., Inc.'s PACA license for the misrepresentation of 7,554 cartons of Washington apples as New Zealand apples. While the number of cartons involved in *Potato Sales Co.* was significantly more than the number of cartons involved in this proceeding, Potato Sales Co., Inc., was only found to have violated section 2(5) of the PACA (7 U.S.C. § 499b(5)), whereas I find that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i). Moreover, the revocation of Potato Sales Co., Inc.'s PACA license is a much more severe sanction than the 45-day suspension of Respondent's PACA license recommended by Complainant.

In *In re Magic Valley Potato Shippers, Inc., supra*, the judicial officer suspended Magic Valley Shippers, Inc.'s PACA license for 30 days for misrepresenting the grade of nine lots of potatoes, which Magic Valley Shippers, Inc., shipped to three different buyers and destinations, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). The judicial officer found that Magic Valley Shippers, Inc., probably had no intention to mislead, but stated that if Magic Valley Shippers, Inc.'s violations had been committed with fraudulent intent, a 90-day suspension would have been imposed. *In re Magic Valley Potato Shippers, Inc., supra*, 40 Agric. Dec. at 1671 n.4. The evidence in this proceeding establishes that, unlike Magic Valley Shippers, Inc., Respondent intended to mislead.

In *In re Maine Potato Growers, Inc., supra*, the judicial officer suspended Maine Potato Growers, Inc.'s PACA license for 60 days for shipping 14 loads of misbranded potatoes over a 4-year period, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

In *In re E.J. Harrison & Son, Inc., supra*, the judicial officer suspended E.J. Harrison & Son, Inc.'s PACA license for 60 days for misrepresenting the grade of six lots of potatoes, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

Even if the sanction imposed against Respondent is more severe than the sanction imposed against offenders in similar cases, it would not render the sanction in this proceeding invalid. A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases

and will be overturned only if it is unwarranted in law or without justification in fact.<sup>3</sup>

The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the PACA, and the PACA has no requirement that there be uniformity in sanctions among violators.<sup>4</sup> The Secretary of Agriculture is clearly authorized under the PACA to suspend Respondent's PACA license for 45 days to deter willful, flagrant, and repeated violations of the PACA, and I find that the facts in this proceeding justify the imposition of a 45-day suspension of Respondent's PACA license.

Respondent contends that the sanction is severe in light of Respondent's cooperation with the investigation of its violations of the PACA (Respondent's Answer

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<sup>3</sup>*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997).

<sup>4</sup>*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981).

Brief at 4). The record establishes that Respondent "gave full and complete cooperation" to PACA Branch employees during their investigation of Respondent's violations of the PACA (Tr. 185, 214). However, Respondent's cooperation with the investigation of its violations of the PACA is not relevant to the sanction to be imposed for Respondent's willful, flagrant, and repeated violations of sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i). Further, Respondent contends that its cooperation with the investigation of its violations indicates a "lack of bad faith" and "lack of intent." I do not find that Respondent's cooperation with the investigation establishes that Respondent lacked bad faith or that Respondent's violations were not intentional. To the contrary, I find that Respondent intentionally misrepresented the origin of 411 cartons of limes to deceive three of its customers.

Respondent contends that a 45-day suspension of its PACA license is severe in light of Respondent's financial condition (Respondent's Answer Brief at 6-7).

The record does establish that Respondent is "probably not" in good financial condition (Tr. 216-17). While section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. II 1996)) does require the Secretary to consider factors relating to a violator's business (the size of a violator's business and the number of a violator's employees) when determining the amount of a civil penalty to be assessed, factors related to a violator's business need not be considered with respect to revocation or suspension of a violator's PACA license.<sup>5</sup> I do not find that Respondent's financial condition is relevant to the issue of

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<sup>5</sup>*In re Allred's Produce*, 56 Agric. Dec. 1884, 1903 n.13 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Havana Potatoes of New York Corp.*, 55 Agric. (continued...)

the length of the period during which Respondent's PACA license should be suspended for its willful, flagrant, and repeated violations of sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), and 499i).

Respondent contends that, in light of the 1995 amendment of the PACA providing for the assessment of civil penalties, the suspension of its PACA license is severe and that Congress intended that a civil monetary penalty would be appropriate in this type of proceeding (Respondent's Answer Brief at 7-8).

I disagree with Respondent's contention that Congress only intended assessment of a civil penalty in proceedings such as the instant proceeding. While the PACA was amended in 1995 to allow the imposition of civil penalties, the amendment does not eliminate the sanctions of license revocation and suspension. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides that, in lieu of suspending or revoking a license for a violation of section 2 of the PACA (7 U.S.C. § 499b), the Secretary *may* assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues.

The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

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<sup>5</sup>(...continued)

Dec. 1234, 1279 n.8 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225 n.13 (1996), *aff'd*, No. 96-4238 (7th Cir. Aug. 10, 1998).



*Section 11—Imposition of civil penalty in lieu of suspension or revocation*

Section 11 authorizes USDA to assess civil monetary penalties not to exceed \$2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 104-207 at 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

. . . .

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

. . . .

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).*

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).*

The language of section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. II 1996)) and the legislative history make clear that the Secretary of Agriculture may choose to assess a civil penalty for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu of license revocation or suspension, but that license revocation or license suspension would be appropriate for "egregious violations" of the PACA.

Respondent willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) in a deliberate attempt to deceive three of its customers as to the origin of limes. The appropriate sanction under the circumstances is suspension of Respondent's PACA license.

Respondent contends that the sanction imposed must be predicated upon the issues framed in the Complaint which alleges only three transactions to be in violation of the PACA (Respondent's Answer Brief at 8-9).

The Complaint alleges that: (1) Respondent misrepresented the origin of limes and that "[t]hese misrepresentations were *in connection with*" transactions which involved 411 cartons of limes, sold to three customers, shipped to three different destinations, on three different dates (Compl. ¶ III (emphasis added)); (2) Respondent made, for a fraudulent purpose, false and misleading statements in connection with 411 cartons of limes, sold to three customers, shipped to three different destinations, on three different dates (Compl. ¶ IV); and (3) during at least the period January 1996 through September 1996, Respondent failed to keep such accounts, records, and memoranda that fully and correctly disclose all transactions involved in its business (Compl. ¶ V). The Complaint does not in any way suggest that Respondent committed only three violations of the PACA or that Respondent made only one misrepresentation or false and misleading statement for each of the three transactions identified in paragraph III of the Complaint. Instead, the Complaint clearly alleges that Respondent's numerous misrepresentations and false and misleading statements were *in connection with* three transactions.

In *In re Potato Sales Co.*, *supra*, 54 Agric. Dec. at 1404, the judicial officer found that each misrepresented carton, rather than each shipment, constitutes a violation of section 2(5) of the PACA, as follows:

In the present case, Respondent misrepresented the place of origin of 7,554 cartons of apples, each of which was a separate violation. But even if we were to count thousands of violations on each shipment as only one violation per shipment (which would not be proper), Respondent prepared three different orders of misrepresented apples, and three separate violations would still be "repeated."

I find that *each* misrepresentation by Respondent of the origin of limes identified in paragraph III of the Complaint constitutes a separate violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)), *each* false and misleading statement made by Respondent for a fraudulent purpose in connection with the limes identified in paragraph III of the Complaint constitutes a violation of 2(4) of the PACA (7 U.S.C. § 499b(4)), and *each* failure by Respondent to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business constitutes a violation of section 9 of the PACA (7 U.S.C. § 499i).

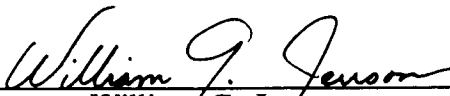
For the foregoing reasons, the following Order should be issued.

**Order**

Respondent's PACA license is suspended for a period of 45 days, effective 60 days after service of this Order on Respondent.

Done at Washington, D.C.

August 18, 1998

  
\_\_\_\_\_  
William G. Jenson  
Judicial Officer